DOCUMENT RESUME

ED 398 924 IR 055 982

AUTHOR Delzell, Barbara
TITLE Does Copyright Infringe on Freedom To Exchange Ideas?
PUB DATE 95
NOTE 7p.; In: The Internet--Flames, Firewalls and the Future. Proceedings for the 1995 Conference of the Council for Higher Education Computing Services (CHECS) (Roswell, New Mexico, November 8-10, 1995).
PUB TYPE Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Reports - Descriptive (141) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Constitutional Law; *Copyrights; Fair Use (Copyrights); Federal Regulation; *Freedom of Information; *Freedom of Speech; Government Role; History; *Information Dissemination; *Intellectual Freedom; Internet; Laws; Misconceptions; Technological Advancement
IDENTIFIERS *Legislative History; Public Private Relationship

ABSTRACT

This paper examines copyright from an historical perspective, asserting that technology is and always has been the driving force behind copyright restrictions. In sixteenth-century England the printing press galvanized legislation. Today, technology, primarily in the form of the Internet, is once again a driving force behind a renewed and concerted effort by copyright owners to re-establish their territory. A timeline shows the progression of copyright as a censorship tool to a promotion-of-learning tool, and a table shows the theoretical issues still being debated about the proprietary versus regulatory nature of copyright. Confusion over the nature of copyright laws often leads to private laws made in total disregard of public law. The way copyright law is being interpreted by contemporary courts, the freedom to exchange ideas is moving toward extinction. The nature of copyright must be decided, and judicial decisions must rest on constitutional grounds. Otherwise, special interest groups wielding considerable economic power will continue turning copyright into a tool for guaranteeing a profit, sanctioned monopoly, and a universal tool for censorship. (Author/SWC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 398 924

DOES COPYRIGHT INFRINGE ON FREEDOM TO EXCHANGE IDEAS?

by: Barbara Delzell,
Engineering Library
New Mexico State
University

"Nothing is so firmly believed as what we least know."
--Montaigne

Before a response to this question can be addressed, both freedom to exchange ideas as well as copyright need to be examined separately. Freedom to exchange ideas will be viewed by way of very brief philosophical consideration of concepts which it encompasses, freedom of thought and freedom of speech. Copyright will be viewed in more detail from a historical perspective. An outline of concepts, some milestone events, and their relationship to intellectual freedom will be discussed.

Intellectual freedom

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." --John Milton

First, to say it's generally accepted that humans should be free to exchange ideas is probably not an exaggeration. The act of exchanging ideas contains within it two foundational abilities, the ability to think and the ability to express that thinking. From birth to death, we are literally free to think whatever thoughts we wish, without external hindrance. The working of a person's mind is generally held to be a private and personal matter, as long as it remains concealed. This seemingly inborn liberty, however, is not satisfied with concealment. Humans are compelled by another seemingly inborn trait, to share - reveal - communicate - the product of their thinking. Socrates represents the extreme of this compulsion when he stated he would prefer to die than to refrain from expressing his thoughts. Socrates' position might not be the generally accepted one. It's probably safe to say, however, that for most humans, the ability to think freely has little value without being accompanied by the freedom to express the product of those thoughts.

The form of this expression is given life in both spoken and written word, art, music, dance, regardless of medium, and includes freedom to speak and write, freedom to hear and read. The idea of such freedom seems very simple, but in fact has a long, bloody history. Centuries of struggle precede the relatively calm environment in which we today routinely practice those freedoms, relatively unhindered. Perhaps it's because there is so little obvious hinderance that most of us take these freedoms as a matter of course, and for granted.

Copyright

"Next to the originator of a good sentence is the first quoter of it." Ralph Waldo Emerson

Copyright law can be traced back to sixteenth-century England. There are those who might argue that copyright origin has little relevance to so-called modern times. But even a cursory inspection of its origin and evolution, created by book publishers in England over 450 years ago, reveals extraordinary parallels in the present day. Technology, in the form of printing presses, was the driver for invention of copyright. Today, technology is once again the driver behind a

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
William L. Adkins
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

IR055987

renewed and concerted effort by copyright owners to establish their territory. The English originators intended to establish a sanctioned monopoly; current trends indicate the same direction and intention. Means of transmission is irrelevant, whether printing press, or the internet. The real and very critical issue is the nature of copyright and its relationship to civilization as we know it. The primary purpose of copyright, as stated in the Constitution of the United States, is to promote the public welfare by the advancement of knowledge. The general impression of the American public seems to be that this is where and how copyright began, from within our Constitution, based on public interest. That is far from the truth. Public interest was not the primary concern or even part of concern in the origination of copyright, as is shown below.

In a global sense, copyright law is the law governing access to the material of learning in whatever form, through any given medium. Simple logic is sufficient to show the outcome of such governance if rights are granted only to creators and purveyors of this material. A very streamlined timeline follows, showing how the concept of copyright went from a censorship tool, to a promotion-of-learning tool. In addition, a brief table will show the theoretical bases which these polarities reflect. Both the timeline and table are derived from Patterson and Lindberg's '*The Nature of Copyright*'.

Copyright timeline

1557 The Tudors granted a royal charter to the guild of stationers; Stationary Company created; precise time of copyright created by merchants is unknown; sanctioned by government as a way to control the press and thus avoid dissent and unrest among 'the people'. Copyright began by and for the benefit of booksellers/stationers; it was a sanctioned monopoly.

1558 Elizabeth I extends charter.

1566

1586 Star Chamber Decrees

1637 These decrees reflected various forms of censorship. Book sellers/stationers promoted censorship and press control to support and perpetuate a profitable monopoly.

1694 End of legally sanctioned censorship. Booksellers/stationers no longer had public protection of the private copyright. They attempted to reinstate censorship laws but were unsuccessful. A new tactic emerged: they sought protection of authors' rights instead of their own, and were successful, to some extent.

1710 The Statute of Anne
"An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." Notable notes: Parliament turned the tables on the monopolists. Key outcomes of the Statute: first, the stationers' copyright, previously used as a device of monopoly and censorship, was

transformed into a trade-regulation concept designed to promote learning. Second, the public domain for literature was created. This was the first instance of public interest being served. The fatal flaw that prevented total success in destroying the booksellers' monopoly was grandfathering of the old stationers' copyrights for 21 years.

1731 Stationers' perpetual copyright expires.
'Battle of the Booksellers' begins, spanning a forty year period of relentless campaigning to perpetuate their monopoly. Ultimately, after failing to get the stationers perpetual copyright reinstated, the tactic turned into obtaining an author's perpetual copyright.

Milestone cases during this period which ultimately impacted US copyright law:

Millar v. Taylor (King's Bench) 1769
Treated copyright as an author's right. Precedent lasted five years. Patterson and Lindberg contend that this case has been misread by American courts and commentators due to incomplete records. More complete records are now available in '*Cobbett's Parliamentary History*' - 1817.

Donaldson v. Beckett (House of Lords) 1774
Patterson and Lindberg contend that this case was where the present day confusion over theoretical duality was born - onetheory that copyright origin occurs at creation (proprietary), the other that origin exists only by statute, (regulatory).

1789 U.S. Constitution empowered Congress to protect literary property and inventions.

1790 Copyright Act of 1790. First U.S. copyright statute, using the Statute of Anne as its model.

1909 Major revision of Act of 1790 - significant change: 'the copyright owner's rights are limited to those specified in the statute.'

1976 Copyright Act of 1976. Major revision and enlarged scope of copyright to include new technology. This statute reflects the underlying premise of distinction between the work and its copyright.

Copyright law is complex. So it's important to simplify by tracing the theoretical issues still under debate in and out of court today, their related origins, and relationship of authors, copyright owners, and users. The crucial importance copyright plays in what amounts to the control of information makes it imperative that interpretations are applied according to intended premises. And all parties involved (essentially everyone), need to have some grasp of the core issues and intended premises in order to monitor, participate, and act responsibly.

Contrary to popular belief, copyright law is not cast in stone. There is an ongoing debate in the judiciary system and among its practitioners. The debate is about whether the nature of copyright is proprietary, or regulatory. A short table follows to help clarify origins and proponents of each theory, and resulting trends.

Theoretical issues still being debated about the nature of copyright.

PROPRIETARY	VS	REGULATORY
Origin occurs at creation.		Origin exists only by statute.
Natural-law property right.		Statutory grant of a limited monopoly.
Origin of booksellers'/stationers monopoly and censorship tool.		
Copyright owners, authors, competitive others with vested interests are primary proponents.		Congress, 'the people', non-users, benefit from this theory.
Court cases raise this most often concept because most of the modern cases brought to court are brought by from publishers.		19th century courts favored this This concept was the basis of law 1790 to 1976.
Contemporary courts favor this concept.		

Both the proprietary and regulatory premises are available for judicial application. The seemingly inconsistent interpretations are a reflection of what Patterson and Lindberg call "jurisprudential flaw of copyright: the failure of the courts to distinguish and to treat as separate entities the original work, the copyright, and a subsequent copy of that work." Another consequence of that same misinterpretation can be seen in the example of the Copyright Clearance Center, which 'licenses' personal use of published works by copying. This amounts to a 'user tax', and is based on the idea that the copyrighted work is the 'property' of the copyright owner.

Discussion

"The law hath not been dead, though it hath slept".
--William Shakespeare

The Constitution empowers Congress to enact copyright statutes. This power is limited to granting copyright to authors only. The law of entrepreneurs' rights derives from authors rights. The law of users' rights is a by-product of the limitations on rights of authors and publishers as copyright owners. The intent, mandated by the Constitution, is that **ideas must be free for all to use. Copyright does not protect ideas, only their expression.** Because the law of users rights is in essence a second order derivative of limitations on creators and distributors, it's not surprising that this segment of copyright is typically left in silence. Certainly those whose interests are best served by monopolistic frameworks aren't going to articulate anything contrary to their interests, even if to do so would rightly serve public interest. Because of the confusion over the nature of copyright, even those who seek to support and enhance learning and the public good may unintentionally fail to see long range consequences of any given choices or decisions.

Two examples follow, to illustrate how current events are reflecting this very serious problem. Fair Use is universally applicable to all copyrighted works without exception: this conclusion is based on the copyright act, and isn't undergoing any controversy. That it should be extended to new technology is intended in the law, and is a logical conclusion. However, the opposite is happening, as illustrated in the first example, a brochure published in 1987 by EDUCOM and ADAPSO excerpted below:

> (1) Unauthorized copying is illegal. Copyright law protects software authors and publishers, just as patent law protects inventors.
> (2) Unauthorized copying of software by individuals can harm the entire community
> (3) Unauthorized copying of software can deprive developers of a fair return for their work, increase prices, reduce the level of future support, and inhibit the development of new software products.

Using the interpretation consistent with the Constitution, the first error is equating copyright law with patent law. Patterson and Lindberg point out that more importantly, nothing is said about fair-use, which does NOT require authorization, and is typical of officious pronouncements, often taken as absolute law by uninformed users who are for the most part quite ignorant of their legal rights.

The second example comes from a Copyright Clearinghouse Center notice distributed by publishers who subscribe to their services. This is another example of official-sounding pronouncements intended to intimidate uninformed users, and perhaps even discourage those users to dig deeply enough to discover where they stand.

> Authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by The Bureau of National Affairs, Inc., for libraries or other users registered with the Copyright Clearance Center (CCC), provided that the base fee of $0.50 per page is paid directly to the Copyright Clearing House Center, 21 Congress St., Salem, Mass. 01970 or to the Bureau of National Affairs, Inc.

BEST COPY AVAILABLE

Patterson and Lindberg indicate this is an example of making private law in total disregard of public law, making unconstitutional use of copyright under both the copyright clause, and the free speech clause of the First Amendment, and making unlawful use of copyright under the 1976 Copyright Act.

The danger to all the freedoms implied in the free exchange of ideas is very real, very immediate. So the answer is yes, the way copyright law is being interpreted by contemporary courts, the freedom to exchange ideas is moving toward extinction. We're in a time of information-related revolution. And the bottom line is very clear: it's a critical time and we better, as a society, as a people, as responsible world citizens, get our copyright act together, before it's too late.

It seems clear that the nature of copyright must be decided, and judicial decisions must rest on constitutional grounds. Otherwise, special interest groups wielding considerable economic power, will continue turning copyright into a tool for guaranteeing a profit, sanctioned monopoly, and a universal tool for censorship.

References

American Voices. New York: Philip Morris USA, 1987.

Bennett, James R. *Control of information in the United States. An annotated bibliography.* Connecticut: Meckler, 1987.

Bury, J.B. *A history of freedom of thought.* New York: Henry Holt, 1913.

Gipe, George A. *Nearer to the Dust.* Maryland: Williams & Wilkins, 1967.

Lawrence, John Shelton, and Timberg, Bernard. *Fair use and free inquiry.* New Jersey: Ablex, 1980.

Patterson, L. Ray and Lindberg, Stanley W. *The nature of copyright. A law of users' rights.* Georgia: University of Georgia, 1991.

Risher, Carol A. and Gasaway, Laura N. "The great copyright debate". *Library Journal,* September 15, 1994, pp. 34-37.

Sableman, Mark. "Trends in copyright law threaten spread of knowledge." *St. Louis Journalism Review*, February 1992, p. 14.